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COURT OF CRIMINAL APPEALS
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No. PD-0027-21
In the
Court of Criminal Appeals
Austin, Texas

No. 14-19-00154-CR
In the
Court of Appeals
for the
Fourteenth District of Texas
at Houston

No. 1527611
208th District Court
Harris County, Texas

THE STATE OF TEXAS
Appellant
V.
JOHN WESLEY BALDWIN
Appellee

APPELLEE'S REPLY TO THE STATE'S BRIEF ON REVIEW

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Pursuant to TEX. R. APP. P. 38.2(a)(1)(A), a complete list of the names of all interested parties is provided below.

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

STATEMENT OF THE CASE

Appellee was charged by indictment with capital murder. (CR 10). He filed a pretrial motion to suppress, challenging the basis of his traffic stop and whether there was sufficient probable cause in the affidavit to justify the search of his cell phone. (CR 88-95). The hearing was presided over by Judge Denise Collins, who made oral findings of fact and conclusions of law. (RR II 4-18). She determined that the traffic stop was lawful, but that the warrant failed to allege facts to establish probable cause to believe appellee's cell phone contained evidence of a crime. (RR II 17-18). Judge Collins did not sign a written order granting the motion to suppress. In January 2019, Judge Greg Glass was sworn in as the presiding judge of the 208th District Court. Judge Glass signed an order granting the motion to suppress in its entirety. (CR 96). The State appealed the order. (CR 97-99).

After oral argument before the Fourteenth Court of Appeals, the court abated the appeal and remanded the case to Judge Glass with instructions to clarify the scope of his order. *State v. Baldwin*, No. 14-19-00154-CR, 2020 WL 4530149, at *3 (Tex. App.--Houston [14th Dist.] Aug.

6, 2020), *reh'g denied* (Dec. 10, 2020), *opinion withdrawn and superseded on reh'g en banc*, 614 S.W.3d 411 (Tex. App. --Houston [14th Dist.] 2020), pet. granted (Mar. 31, 2021). Upon remand, Judge Glass held a brief hearing, where he explained that he had intended to adopt all of Judge Collins's rulings. *Id.* Judge Glass then signed an amended order granting the motion to suppress in part as to the cellphone evidence and denying the motion to suppress regarding the legality of the traffic stop. *Id.*

On August 6, 2020, a majority panel of the appellate court reversed the District Court's ruling suppressing the search of appellee's cell phone. *Id.* Appellee's Motion for En Banc Reconsideration was granted and the en banc court withdrew the majority opinion, vacated the judgment of August 6, 2020, and issued an opinion affirming the trial court's ruling granting the motion to suppress. *State v. Baldwin*, 614 S.W.3d 411 (Tex. App.--Houston [14th Dist.] 2020), pet. granted (Mar. 31, 2021).

STATEMENT OF FACTS

Two African American males forced their way into the home of brothers Adrianus and Sebastianus Kusuma on September 18, 2016. (State's exhibit, 4). The perpetrators were masked and armed with handguns. (State's exhibit, 4). Sebastianus was beaten and Adrianus was shot and killed. (State's exhibit, 4). Sebastianus followed the men outside and observed them getting into a white, four-door sedan before leaving the scene. (State's exhibit, 4).

A subsequent investigation uncovered a neighbor who reportedly observed a white, four-door sedan exiting the neighborhood at approximately 8:45 p.m. at a "very high rate of speed." (State's exhibit, 4). Another neighbor informed law enforcement that she observed a white, four-door sedan, with license plate number GTK-6426, in the neighborhood on "multiple occasions" on September 17, 2016. (State's exhibit, 4). The vehicle was occupied by "two black males." (State's exhibit, 4).

A resident's surveillance video depicted a white, four-door sedan in the neighborhood once on September 18, 2016, and three times on September 19, 2016, which was the day after the murder. (State's

exhibit, 4). A citizen also reported that he observed a white Lexus GS300 that "lapped his residence" three times. (State's exhibit, 4). The vehicle was driven by a "large black male[1]." (State's exhibit, 4).

On September 22, 2016, a vehicle bearing license plate GTK-6426 was stopped for alleged traffic violations. (State's exhibit 4). Appellee was driving and gave officers consent to search the vehicle, where a cell phone was recovered. (State's exhibit 4). Law enforcement obtained a search warrant for the contents of the phone. The affidavit in support of the warrant stated:

> Affiant knows that phones and "smartphones" such as the one listed herein, are capable of receiving, sending, or storing electronic data and that evidence of their identity and others may be contained within those cellular "smart" phones. Affiant also knows it is possible to capture video and photos with cellular phones. Further, Affiant knows from training and experience that cellular telephones are commonly utilized to communicate in a variety of ways such as text messaging, calls, and e-mail or application programs such as google talk or snapchat. The cellular telephone device, by its very nature, is easily transportable and designed to be operable hundreds of miles from its normal area of operations, providing reliable and instant communications. Affiant believes that the incoming and outgoing telephone calls, incoming and outgoing text messaging, emails, video recordings and subsequent voicemail messages could contain evidence related to this aggravated assault investigation.

[1] Appellee is 5'9" and 180 lbs. (RR I 195).

Additionally, based on your Affiant's training and experience, Affiant knows from other cases he has investigated and from training and experiences that it is common for suspects to communicate about their plans via text messaging, phone calls, or through other communication applications. Further, Affiant knows from training and experiences that someone who commits the offense of aggravated assault or murder often makes phone calls and/or text messages immediately prior and after the crime.

Affiant further knows based on training and experience, often times, in a moment of panic and in an attempt to cover up an assault or murder that suspects utilize the internet via their cellular telephone to search for information.

Additionally, based on your Affiant's training and experience, Affiant knows from other cases he has investigated and from training and experiences that searching a suspect's phone will allow Jaw enforcement officers to learn the cellular telephone number and service provider for the device. Affiant knows that law enforcement officers can then obtain a subsequent search warrant from the cellular telephone provider to obtain any and all cell site data records, including any and all available geo-location information [sic] for the dates of an offense, which may show the approximate location of a suspect at or near the time of an offense.

Based on Affiant's training and experience, as well as the totality of the circumstances involved in this investigation, Affiant has reason to believe that additional evidence consistent with robbery and/or murder will be located inside the cellular telephone, more particularly described as: a Samsung Galaxy5, within a red and black case, serial #unknown, IMEI #unknown.

> Affiant believes that call data, contact data, and text message data, may constitute evidence of the offense of robbery or murder.

(State's exhibit 4)

APPELLANT'S GROUNDS FOR REVIEW

I. The court of appeals departed from the proper standard of review by submitting its judgment for that of the magistrate who viewed the warrant affidavit and found probable cause.

II. The court of appeals employed a heightened standard for probable cause, departing from the flexible standard required by law.

REPLY TO APPELLANT'S GROUNDS FOR REVIEW

Appellant alleges that the en banc court did not utilize the proper standard of review when evaluating the affidavit in support of the search warrant. Specifically, the State contends that the court submitted its own judgment for that of the magistrate and departed from a flexible standard when reviewing the affidavit.

Appellant and appellee agree on the proper standard of review. However, the parties disagree on how the standard should be applied to the specific facts of this case.

Standard of Review

The Fourth Amendment to the United States Constitution mandates that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. AMEND. IV. The core of the Fourth Amendment's warrant clause and its Texas equivalent is that a magistrate may not issue a search warrant without first finding "probable cause" that a particular item will be found in a particular location. *State v. Duarte*, 389 S.W.3d 349, 354 (Tex. Crim. App. 2012).

The test is whether a reasonable reading by the magistrate would lead to the conclusion that the four corners of the affidavit provide a "substantial basis" for issuing the warrant. *Id.* Probable cause exists when, under the totality of the circumstances, there is a "fair probability" that contraband or evidence of a crime will be found at the specified location. *Id.* This is a flexible, nondemanding standard. *Id.*

Neither federal nor Texas law defines precisely what degree of probability suffices to establish probable cause, but a magistrate's action cannot be a mere ratification of the bare conclusions of others. *Id.* A

magistrate should not be a rubber stamp. *Id.* "In order to ensure that such an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued." *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 239, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)).

The appellate court used the proper standard of review in determining that there was insufficient probable cause in the affidavit to establish that the vehicle appellee was driving four days after the offense was connected to the murder and that a search of appellee's cellphone was likely to produce evidence in the investigation of the murder

The affidavit accompanying the search warrant states that, on September 18, 2016, the complainant's brother followed two black men from the home and saw them getting into a white, 4-door sedan. (State's exhibit 4). That same night, at approximately 8:45 p.m., a neighbor observed a white, 4-door sedan exiting the neighborhood "at a very high rate of speed." (State's exhibit 4). Another neighbor informed law enforcement that a white, 4-door Lexus, bearing Texas license plate GTK-6426, was observed driving through the neighborhood "on multiple occasions" on Saturday, September 17, 2016. (State's exhibit 4). A residential surveillance camera captured video images of a white, 4-door vehicle in the neighborhood one time prior to the murder. (State's exhibit

4). "The same vehicle" was also observed on the video three times the following day. (State's exhibit 4).

Although the magistrate is permitted to make inferences when reviewing the affidavit for probable cause, those inferences must be reasonable. *Davis v. State*, 202 S.W.3d 149, 154 (Tex. Crim. App. 2006). Additionally, any reasonable inferences must establish a correlation between the vehicle observed fleeing the scene of the crime and the one appellee was driving four days after the murder.

The State alleges that it was reasonable for the magistrate to infer that the Lexus appellee was driving four days after the offense was linked to the capital murder. The affidavit sets forth that the suspects fled in a white, 4-door sedan. (State's exhibit 4). A white, 4-door Lexus with license plate number GTK-6426 was observed in the neighborhood one time prior to the murder and three times the following day. (State's exhibit 4). There is nothing in the affidavit to indicate that the Lexus was the same white, 4-door sedan seen fleeing the scene. Nor does the affidavit link appellee's vehicle to the murder in any other way. For the magistrate to infer otherwise, he would have to start from the position that the two vehicles were one in the same. Descriptors such as "white,"

"4-door," and "sedan" are far too ordinary and common place to make such an inference[2].

Put simply, a vehicle similar in appearance to the one appellee was driving four days later was observed fleeing the scene of the crime. No case goes as far as to state that this, alone, is sufficient to establish probable cause to believe the vehicle was involved in the offense. *See, e.g.*, *Amores v. State*, 816 S.W.2d 407, 416 (Tex. Crim. App. 1991) (holding lack of description of suspect beyond his gender and race, general description of vehicle, and lack of information regarding source or credibility of information were insufficient facts to support probable cause to believe the suspect had committed a burglary); *Ford v. State* 444 S.W.3d 171, 193 (Tex. App.--San Antonio 2014), *aff'd*, 477 S.W.3d 321 (Tex. Crim. App. 2015) (vehicle in surveillance photos was similar to one driven by the defendant, but the affidavit also included information regarding prior dating relationship between Ford and the deceased, that a man similar in appearance to Ford entered the deceased's residence around the time of the murder, Ford's vehicle was not present at his home when he reported that he was there, specific characteristics of the Tahoe,

[2] On the other hand, a low riding, red truck with oversized tires, and a "Q" in the license plate, would present an entirely different situation.

and male DNA on a towel covering the deceased's head); *Gabriel v. State*, 290 S.W.3d 426, 435 (Tex. App.--Houston [14th Dist.] 2009, no pet. h.) (holding affidavit supporting search warrant was sufficient to establish probable cause that the defendant's vehicle was used during the commission of fraud. A person similar in appearance to the defendant driving a vehicle similar in appearance to one owned by the defendant was observed at ATM where fraudulent cards were used. But affidavit also included applications for postal boxes signed by the defendant, described how officers identified the defendant through numerous driver's licenses under different aliases, detailed how officers found shredded credit cards and mail relating to fraudulent accounts in appellant's garbage, affidavit included list of names found on mail, which matched up with names on fraudulent accounts, and affidavit provided different sources of evidence pointing to residence and vehicle as being places where further evidence of elaborate fraud scheme could be found.); *Arrick v. State*, 107 S.W.3d 710, 716 (Tex. App.--Austin 2003, pet. ref'd.) (holding affidavit in support of search warrant gave issuing magistrate probable cause to believe that defendant's car was used in commission of murder; defendant told witness that he transported victim's body to

adjoining state by car, defendant normally drove the car in question, and he was driving it on the last day victim was seen alive.).

The affidavit does not establish a nexus between the white sedan observed fleeing the scene after the murder and the vehicle appellee was driving four days later. Any inferences that the vehicles were all the same is not supported by the statements in the affidavit, and are therefore, unreasonable.

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In *Riley v. California*, the United States Supreme Court unanimously held that the search incident to arrest doctrine did not authorize the warrantless search of a cell phone. 573 U.S. 373, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014). In reaching its conclusion, the Court cited to the vast amount of private information people now hold on their cellular devices. *See id.*, at 2490 (Cell phones differed from other physical objects both quantitatively and qualitatively, given phones' immense storage capacity, collection in one place of many distinct types of private information, and ability to convey more information than previously possible, and phones also presented issue that they can access information not stored on phones themselves, which information

government conceded was not covered by this exception.). The Court refused to permit the search of a cell phone incident to arrest based upon an officer's reasonable belief that information relevant to the crime of arrest, arrestee's identity, or officer safety would be discovered. *Id.*, at 2492.

Further, the Supreme Court mandates that law enforcement needs more than just a generalized suspicion that a cell phone contains evidence of a crime to search the phone pursuant to a warrant. *See Franks v. Delaware*, 438 U.S. 154, 165, 98 S. Ct. 2674, 2681, 57 L. Ed. 2d 667 (1978) (A warrant affidavit must set forth particular facts and circumstances underlying the existence of probable cause.). Simply putting general statements and beliefs into an affidavit, without specific facts pertinent to the investigation, results in a virtual search incident to arrest. This violates both federal and state precedent.

Thus, an affidavit offered in support of a warrant to search the contents of a cellphone must "state the facts and circumstances that provide the applicant with probable cause to believe ... searching the telephone or device is likely to produce evidence in the investigation of ... criminal activity." TEX. CODE CRIM. PROC. ART. 18.0215(c)(5)(B). Such an

affidavit "must usually include facts that a cell phone was used during the crime or shortly before or after." *Diaz v. State*, 604 S.W.3d 595, 603 (Tex. App.--Houston [14th Dist.] 2020, pet. granted) (citing *Foreman v. State*, 561 S.W.3d 218, 237-38 (Tex. App.--Houston [14th Dist.] 2018) (en banc) (noting, in dicta, that "an affidavit offered in support of a warrant to search the contents of a cellphone must usually include facts that a cellphone was used during the crime or shortly before or after"), *rev'd*, No. PD-1090-18, 613 S.W.3d 160 (Tex. Crim. App. Nov. 25, 2020)).

The State posits that the affidavit established probable cause to connect appellee's cellphone to the murder because it "…included a number of statements about the use of cellphones generally, which were based on the affiant's training and experiences." (Appellant's Brief on Review, 12). But the dissent acknowledges that the statements in the affidavit about the general use of cellular devices "are 'boilerplate recitations designed to meet all law enforcement needs for illustrating certain types of criminal conduct,' and affiants should not rely on such generalizations because they run the risk 'that insufficient particularized facts about the case or the suspect will be presented for a magistrate to determine probable cause.'" *Baldwin*, 614 S.W.3d at 425 (Christopher, J.

dissenting), quoting *United States v. Weaver*, 99 F.3d 1372, 1378 (6th Cir. 1996).

Despite such criticism and caution, the dissent and State rely on one of the "generic" and "boilerplate recitations" to establish probable cause that the phone contained evidence of the offense. *Baldwin*, 614 S.W.3d at 425 (Christopher, J., dissenting); Appellant's Brief on Review, 17-18. The statement that "it is common for suspects to communicate about their plans via text messaging, phone calls, or through other communication applications" "establishes that criminal suspects use cellphones for planning purposes, and that fact has some bearing here because the affidavit established that the capital murder was committed, not by a lone wolf, but by two men acting in concert who prepared for the offense over the course of two days. The magistrate could have reasonably concluded that this joint activity required a certain level of coordination and communication, the evidence of which might be discovered on a cellphone." State's exhibit 4; *Baldwin*, 614 S.W.3d at 425 (Christopher, J., dissenting).

Under this reasoning, any time more than one person is involved in a crime, police officers would have probable cause to search the cellphone

of a suspected person. This is insufficient to establish the fact-specific nexus between a cell phone and the offense that the Fourth Amendment requires. Such an interpretation would also result in no meaningful appellate review of a magistrate's determination pertaining to probable cause.

Nothing in the affidavit ties a cellphone to the offense or establishes that a cell phone was used during the crime or shortly before or after[3]. At best, the affidavit contains only unreasonable inferences that are not supported by any facts that the phone in appellee's possession contained evidence of the offense.

Magistrates are permitted to draw reasonable inferences from the facts and circumstances contained within the four corners of the affidavit. *Davis*, 202 S.W.3d at 154. However, "[w]hen too many inferences must be drawn, the result is a tenuous rather than substantial basis for the issuance of a warrant." *Id.* at 157. Probability cannot be based on mere conclusory statements of an affiant's belief. *Rodriguez v. State*, 232 S.W.3d 55, 61 (Tex. Crim. App. 2007).

[3] Even the lead detective and affiant conceded that she had no proof that evidence of the murder would be contained on the phone. (RR I 148, 149).

CONCLUSION

The appellate court utilized the proper standard of review in determining that the affidavit lacked probable cause to establish that the vehicle appellee was driving four days after the offense was connected to the murder and that a search of appellee's cellphone was likely to produce evidence in the investigation of the murder It is respectfully submitted that this Court affirm the en banc court's decision.

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CERTIFICATE OF COMPLIANCE

In accordance with the Texas Rules of Appellate Procedure, I hereby certify that Appellee's Reply to the State's Brief on Review, filed on June 11, 2021, has 4,066 words based upon a word count under MS Word.

Mandy Miller
MANDY MILLER

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument has been delivered via electronic mail to the following:

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